The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: InterAmerica Legal Systems, Inc.

File: B-224443

Date: September 15, 1986

DIGEST

Contracting agency need not request a best and final offer from an offeror and may instead exclude it from a revised competitive range if it becomes clear from discussions that the offeror no longer has a reasonable chance for award.

DECISION

InterAmerica Legal Systems, Inc., protests the exclusion of its proposal from the competitive range under request for proposals No. JGCIV-86-R-0021, issued March 20, 1986, by the Department of Justice for general litigation support services.[1] InterAmerica contends that the agency acted improperly in failing to request a best and final offer from the firm at the conclusion of discussions. We deny the protest.

The solicitation requests proposals to meet the litigation support requirements of the Civil Division of the Department of Justice. During the first year of the contract (which will have 4 option years), these are estimated to include the initial processing of approximately 5,850,000 pages of government documents and 3,000,000 pages of nongovernment documents. In particular, the primary contractor will be required to microfilm and photocopy documents; "blowback" previously microfilmed documents; abstract and digest documents; screen and code documents; key the resulting data onto magnetic tapes and load the information into data bases;

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[1] InterAmerica Legal Systems, Inc. filed this protest on behalf of the offeror, the InterAmerica Group, a joint venture by InterAmerica Legal Systems, American Legal Systems, and Computer Services Corporation.

provide space, equipment, and staff for the operation of document centers in support of very large case families; and provide deposition and trial support (including paralegals) for small and medium-size cases. In addition, the solicitation provides for the award of a separate quality assurance contract and the possible award of backup contracts. All will be fixed-price requirements contracts except for certain specified services for which the contractors will be reimbursed on a time and materials basis.

In the preproposal conference, Justice emphasized the magnitude of the tasks facing the successful contractors, pointing to the requirement to perform quality work within very tight deadlines notwithstanding the likelihood of unpredictable fluctuations in the demand for litigation support services. In order to evaluate the ability of offerors to meet these stringent requirements, the solicitation required that technical proposals set forth, in as much detail as possible, the offeror's analysis of likely problems in performance, its proposed resources and methods of operation, and the qualifications of the offeror and its proposed personnel.

In response to the solicitation, on May 6, 1986, Justice received initial proposals from six firms, including InterAmerica, to supply the required general litigation support services. Although evaluators found the proposals submitted by InterAmerica and two other firms to warrant further consideration and clarification, they considered InterAmerica's proposal to be no more than "conditionally acceptable," requiring a number of clarifications before it could be considered fully acceptable.

Accordingly, by letter dated June 23, 1986, Justice informed InterAmerica that its proposal had been selected "for further contract consideration" and that "certain clarifications to provide additional information" were required to complete the technical evaluation. The agency listed 31 areas in InterAmerica's proposal for which additional information or clarification was required or which appeared to be otherwise deficient. The agency also asked InterAmerica to submit any changes in its pricing resulting from its response to the technical questions. Justice advised, however, that the agency was "still in the evaluation process and . . . NOT requesting best and final offers at this time."

After reviewing InterAmerica's response, agency evaluators concluded that the firm had failed adequately to resolve a number of the concerns expressed in the request for additional information and, in addition, that new concerns had emerged as a result of the firm's response. In particular, they found that (1) InterAmerica's expressed need

for advance notice in order to meet the required workload was inappropriate in view of the probable absence of lead time and the impossibility of long-range planning; (2) InterAmerica had proposed an inadequate organization and staff, including an insufficient supervisor-to-staff ratio, an insufficient number of staff, and an often insufficiently experienced staff; (3) InterAmerica's proposed quality assurance plan was inadequate; and (4) some of the required tasks were only superficially addressed. Justice gave InterAmerica's proposal a technical score of only 53.84 out of 100 possible points and found it to be technically unacceptable without a major rewrite. Since Justice concluded that the firm lacked a reasonable chance for award, on July 15, 1986, the agency informed InterAmerica that "no further revision" to its proposal was required and that the firm would not be considered for award. InterAmerica thereupon filed this protest with our Office.

Before receipt of the agency report responding to its protest and setting forth the deficiencies in its proposal, InterAmerica questioned whether the evaluation criteria in the solicitation were unduly restrictive of competition and whether Justice's evaluation approach had been adequately disclosed in the solicitation and was consistent with the stated evaluation criteria. In its subsequent comments on the report, however, InterAmerica declined to refute the agency's evaluation of its proposal as technically unacceptable, stating that it believes this should be discussed during continued negotiations. Instead, InterAmerica now contends that the "key point to be considered is a matter of procedure." In particular, the protester argues that the agency improperly failed to request a best and final offer from it, even though, according to InterAmerica, the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.611 (1985), requires such a request at the conclusion of discussions. InterAmerica claims that since the request for additional information indicated that it was not a request for a best and final offer, the firm:

> "in reasonable reliance on the later opportunity to complete discussions and submit a best and final offer, did not feel it absolutely essential to make ALL such revisions as might be indicated in light of the concerns expressed by the Government."

The firm concludes that had it realized that its responses might end the negotiation process, these responses might have differed substantially.

We find InterAmerica's interpretation of the procurement regulations and the request for additional information to be unreasonable. We recognize that FAR, 48 C.F.R. § 15.610(b),

generally provides for the contracting officer to conduct discussions with all responsible offerors who submit proposals within the competitive range, while FAR, 48 C.F.R. § 15.611(a), states that:

> "Upon completion of discussions, the contracting officer shall issue to all offerors still within the competitive range a request for best and final offers." (Emphasis added.)

We point out, however, that by its terms the above requirement extends only to offerors "still within the competitive range." The FAR, 48 C.F.R. § 15.609(b), expressly provides that if the contracting officer, after conducting the discussions specified under section 15.610(b), determines that a proposal no longer has a reasonable chance of being selected for contract award, then such proposal may no longer be considered for award. Likewise, we have previously held that a contracting agency may revise a competitive range determination to eliminate a proposal formerly considered to be within the competitive range if discussions and evaluation of a revised or clarified proposal reveal that the proposal no longer has a reasonable chance of acceptance and that, in this event, the offeror need not be given an opportunity to submit a best and final offer. Cotton & Co., B-210849, Oct. 12, 1983, 83-2 CPD ¶ 451; Pettibone Texas Corp., B-209910, June 13, 1983, 83-1 CPD ¶ 649; see also Johnston Communications, B-221346, Feb. 28, 1986, 86-1 CPD ¶ 211 (inclusion in the competitive range established after initial evaluation does not guarantee that the agency will solicit a best and final offer).

Moreover, we note that not only did the request for additional information not indicate that Justice would necessarily afford InterAmerica the opportunity to submit a best and final offer, but, in addition, that the solicitation warned that failure to submit full and complete information in the technical proposal could result in an offer being found unacceptable. Accordingly, InterAmerica had no basis upon which to expect that it could delay submitting the information necessary for the agency to complete the evaluation of its proposal.

Since InterAmerica no longer challenges the evaluation criteria or the agency's conclusion that its proposal lacked a reasonable chance for award, we find its protest to be without merit.

The protest is denied.

Ronald Berger
for Harry R. Van Cleve
General Counsel